

2015

**West Valley City, Petitioner, -v.- John Coyle and West Valley City
Civil Service Commission, Respondents.**

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca3



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah.

Recommended Citation

Reply Brief, *West Valley City v Coyle & Service Co*, No. 20140457 (Utah Court of Appeals, 2015).
https://digitalcommons.law.byu.edu/byu_ca3/3219

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs (2007–) by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH COURT OF APPEALS

WEST VALLEY CITY,

Petitioner,

-vs-

JOHN COYLE and WEST VALLEY
CITY CIVIL SERVICE COMMISSION,

Respondents.

Appeal No. 20140457

(ORAL ARGUMENT REQUESTED)

**APPEAL FROM THE MAY 15, 2014 DECISION AND ORDER
OF THE WEST VALLEY CITY CIVIL SERVICE COMMISSION**

REPLY BRIEF OF WEST VALLEY CITY

Erik Strindberg
STRINDBERG & SCHOLNICK, LLC
675 East 2100 South, Suite 350
Salt Lake City, UT 84106
Telephone: (801) 359-4169
Attorneys for Respondent Coyle

**WEST VALLEY CITY CIVIL
SERVICE COMMISSION**
3600 Constitution Blvd.
West Valley City, UT 84119-3720

Camille N. Johnson (5494)
Judith D. Wolferts (7023)
Maralyn M. English (8468)
SNOW CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, Utah 84145-5000
Telephone: (801) 521-9000
Attorneys for Petitioner West Valley City

**FILED
UTAH APPELLATE COURTS**

JAN 07 2015

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
I. ARGUMENT	1
A. COYLE INCORRECTLY STATES THE STANDARD OF REVIEW.	1
B. COYLE INCORRECTLY IDENTIFIED THE “GRAVAMEN OF THIS APPEAL.”	3
C. COYLE’S OVERALL ARGUMENTS SHOW REVERSAL IS WARRANTED.	3
D. COYLE’S DISCIPLINE WAS CONSISTENT WITH NNU’S DISBANDING.	6
E. COYLE IMPROPERLY MINIMIZES CHAIN OF CUSTODY VIOLATIONS.	7
F. COYLE LOSES CREDIBILITY BY ARGUING LACK OF TRAINING.	8
G. THE COMMISSION DID NOT ADDRESS ALL POLICY VIOLATIONS.	8
H. THE COMMISSION ERRED IN EVIDENTIARY RULINGS.	10
1. Protected Exhibits Were Proffered, and The Record Cannot Be Disregarded.	10
2. The Commission Made Repeated Improper Hearsay Rulings.	12
I. THE COMMISSION FAILED TO ADDRESS ALL REASONS FOR DEMOTION.....	14
J. IT WAS ERROR TO DISREGARD DISMISSAL OF FELONY CASES.	16
K. COYLE MISCONSTRUES THE CHANGE ISSUE.	18

L.	IT WAS AN ABUSE OF DISCRETION TO DEEM VIOLATIONS TECHNICAL.....	19
M.	THE COMMISSION’S DECISION ON DISCIPLINE SHOULD BE REVERSED.....	23
1.	Proportionality	23
2.	Consistency	25
II.	CONCLUSION.....	26
	CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS	27

TABLE OF AUTHORITIES

Page

Cases

<i>Huemiller v. Ogden Civil Serv. Comm'n</i> , 2004 UT App 375, 101 P.3d 394.....	22
<i>In re Discharge of Jones</i> , 720 P.2d 1356 (Utah 1986).....	3
<i>Kelly v. Salt Lake City Civil Serv. Comm'n</i> , 2000 UT App 235, 8 P.3d 1048.....	22
<i>Lucas v. Murray Civil Serv. Comm'n</i> , 949 P.2d 746 (Utah Ct. App. 1997).....	2
<i>Nelson v. Orem City</i> , 2012 UT App 147, 278 P.3d 1089.....	22
<i>Ogden City Corp. v. Harmon</i> , 2005 UT App 274, 116 P.3d 973.....	1, 9, 21, 23
<i>Perez v. South Jordan</i> , 2014 UT App 31, 320 P.3d 42.....	4
<i>Prosper v. Department of Workforce Servs.</i> , 2007 UT App 81, 68 P.3d 344.....	2
<i>Salt Lake City Corp. v. Salt Lake City Civil Serv. Comm'n</i> , 2006 UT App. 47	1, 15
<i>State v. Torres</i> , 2003 UT App 114, 69 P.3d 314.....	8

Rules

Utah R. Evid. 801	1
Utah R. Evid. 803	1
Utah R. Evid. 804.....	1
Utah R. Evid. 807	1, 2

I. ARGUMENT

A. COYLE INCORRECTLY STATES THE STANDARD OF REVIEW.

Instead of addressing each of WVC's Issues for Review, Coyle provides an overall "Standard of Review" and contends WVC's arguments A, B, C, D, E, and G involve applying facts to law and for these arguments the Commission's Decision is subject to a reasonableness/rationality review standard. Coyle's Brf., pp.v-vi (citing *Ogden City Corp. v. Harmon*, 2005 UT App 274, ¶9, 116 P.3d 973 (citation omitted) and *Salt Lake City Corp. v. Salt Lake City Civil Serv. Comm'n*, 2006 UT App. 47). He also states argument F "involves factual determinations" and should be reviewed under a clearly erroneous standard. This is overly simplistic.

First, Coyle is incorrect in suggesting each issue is separate and distinct and can be divorced from the amalgam of situations inherent in an appeal such as this.

Second, Coyle's assumption ignores basic law such as: (1) hearsay is admissible in Commission hearings; (2) hearsay is an exception under rules such as Utah R. Evid. 801, 803, 804, 807; (3) the relative burdens of proof, including the employee must show discipline imposed is improper; (4) the Commission must give deference to the Chief's choice of discipline; (5) due process applies to WVC and not just Coyle, and a Commission exceeds its authority when it fails to provide due process; (6) a party's not having an opportunity to cross-examine witnesses does not necessarily violate due process. Further, the standard for review for the Commission's first question, *i.e.*, "do the facts support the charges made by the department head," is "substantial evidence" "viewed in light of the whole record" before the appellate court. *Lucas v. Murray Civil*

Serv. Comm'n, 949 P.2d 746, 758 (Utah Ct. App. 1997). That “substantial” evidence must be relevant and competent, and evidence is “not substantial if overwhelmed by other evidence or based on mere conclusion.” *Id.* (citation omitted).

Furthermore, a “residuum” of evidence is not as narrow as Coyle suggests. This Court recognizes “hearsay can constitute legally competent evidence.” *Prosper v. Department of Workforce Servs.*, 2007 UT App 81, ¶11, 68 P.3d 344. This residuum *can* be based on admissible hearsay, which means even hearsay is permitted since the standard is only it “cannot be based *exclusively* on *inadmissible* hearsay.” *Id.* (emphasis added)(citation omitted). Further, “if an out of court statement is offered for some other purpose—*e.g.*, to prove that it was made and not for its truth—it is not hearsay.” *Id.*; *see also id.* ¶13 n.4 (“[employer] offered evidence of customer complaints about [employee] not to establish the truth of any particular complaint, but [] to show she was the object of numerous customer complaints and thus an employee who did not perform satisfactorily”). WVC took this position in the Commission hearing, *i.e.*, argued statements were admissible to show they were made about Coyle and thus were part of the Chief’s consideration, and not necessarily for their truth but instead as part of opinions of others, and also the residual rule of Utah R. Evid. 807 applies. *See* R.1295-3001 (Commission sustains Coyle’s objection to Powell’s testimony about comments made to him by WVC residents); 1374; 1422 (testimony shows “decision factor”); 1446-48; 1530-31 & -34 (Commission refuses to allow Chief Marx to refer to predisciplinary/disciplinary transcripts despite his saying he relied on both when making discipline decision for Coyle); 1545; 1564 (sustaining objection to Chief Marx’s testimony other

officers lost confidence in Coyle); 1566-67 (sustaining objection to Chief Marx's discussing DA's dismissal of cases).

B. COYLE INCORRECTLY IDENTIFIED THE "GRAVAMEN OF THIS APPEAL."

Coyle contends the "gravamen" of this appeal is only whether "the charges warrant the sanction imposed," inasmuch as he already admits committing "two policy violations." Coyle Brf., p.vi. This is incorrect. Chief Marx relied on more than two policy violations plus what he concluded was "[Coyle's] failure to take personal responsibility" (R.4-5), and the Commission's Decision addressed at least four policy violations. (R.1842-46). WVC's appeal addresses all of those violations as well as Chief Marx's conclusion Coyle, the lieutenant in charge, failed to accept responsibility. This means despite Coyle's admitting two policy violations, when assessing whether "the facts support the charges," this appeal must involve all policy violations plus Coyle's failure to accept responsibility during the predisciplinary meeting. *See In re Discharge of Jones*, 720 P.2d 1356, 1361 (Utah 1986).

C. COYLE'S OVERALL ARGUMENTS SHOW REVERSAL IS WARRANTED.

Coyle makes numerous arguments why the Commission should be affirmed, but these actually illustrate why the Commission should be reversed. For example, in addition to arguments below, this Court would have to make several invalid assumptions and/or reach invalid conclusions including the following.

First, this Court would have to disregard the Commission is required to give deference to Chief Marx's decision inasmuch as "he is in a position to balance the

competing concerns.” *Perez v. South Jordan*, 2014 UT App 31, ¶25, 320 P.3d 42. The Commission’s lack of deferral is verified by Coyle’s acknowledgment in his brief that “[granted], someone else may have reached a different conclusion” on discipline than the Commission did. *See* Coyle’s Brf. p.28. Chief Marx *did* reach a different conclusion, but the Commission reversed that disciplinary decision even though it was required to give deference to *Chief Marx’s* judgment there.

Second, this Court would have to accept the Commission did not abuse or exceed its authority when it downgraded to “technical” (or what Coyle calls “minor” (Coyle’s Brf. p.28)) what the Commission had already found were violations of chain of custody, BlueTeam, and the change issue. Add to this, even though the Commission found a violation of the change issue, it then inexplicably chose to disregard that and stated there was *no* violation.

Third, the Court would have to remove from the discipline equation any reliance by Chief Marx on violation of the Performance and Supervisory policies as well as his conclusion that Coyle, as lieutenant, failed to accept responsibility. This is because the Commission apparently disregarded those aspects of Chief Marx’s decision when it assessed discipline.

Fourth, the Court would have to disregard Chief Marx’s finding Coyle, the lieutenant in charge, not only failed to accept responsibility but he instead sought to shift blame: (1) to the sergeant he supervises; (2) to detectives he is charged with overseeing; (3) to his superiors; (4) by saying “that’s the way it’s always been done”; (5) to Det.

Frausto who was the “asset seizure specialist” despite the fact Det. Frausto raised the change issue with Coyle. R.653-54.

Fifth, the Court would have to agree violations are mitigated based on Coyle’s claims he did not receive a job description for “lieutenant,” even though Coyle already was a lieutenant prior to his applying to head NNU.

Sixth, the Court would have to agree Coyle and Sgt. Johnson are similarly situated, even though Coyle was NNU lieutenant, was lieutenant in Patrol before heading NNU, and first assumed a *sergeant* supervisory position in 2006, whereas Sgt. Johnson was never a lieutenant and had been in a *sergeant* supervisory position only since 2011.

Seventh, the Court would have to disregard that every detective in NNU received individual discipline for the chain of custody and change issues, and Chief Marx stated in those decisions that the “standards” had been “set by supervisors.”

Eighth, the Court would have to accept that every NNU detective could be disciplined because his/her conduct on the chain of custody and change issues brought discredit to NNU and loss of public confidence in WVCPD (as stated in the Letters of Counsel), but Coyle cannot be so disciplined because the Commission allegedly found no “causation” those violations brought discredit to NNU or loss of public confidence.

Ninth, the Court would have to determine it could not have impacted NNU detectives’ morale when every one of them was disciplined because of Coyle’s failure as a lieutenant. The Commission failed to recognize this.

Tenth, this Court would have to find Assistant D.A. Anna Rossi's *admissible* statements do not show D.A. Sim Gill dismissed NNU cases based on NNU's evidence issues.

For these reasons and others discussed below, reversal is warranted.¹

D. COYLE'S DISCIPLINE WAS CONSISTENT WITH NNU'S DISBANDING.

Coyle suggests disbanding of NNU in late 2012 was not part of the disciplinary action and was not an issue at the hearing. Coyle's Brf. p.vii. To the contrary, the disbanding itself and that every member of NNU was investigated and then disciplined, cannot be ignored when considering Coyle's discipline since he bore ultimate responsibility for NNU. This also is consistent with Chief Marx's finding and hearing testimony Coyle did not accept responsibility during the predisciplinary meeting.

R.1558-59.

Coyle also attempts in this context to minimize discipline of NNU's members by stating that with one exception, NNU detectives "received only letters of discipline." *Id.* However, any discipline is significant, and Chief Marx chose to discipline all NNU detectives even though PSRB recommended discipline only for Det. Cowley (termination recommended) and Franco (termination and/or forty hours unpaid suspension). Coyle's Brf. pp.21-22 (citing R.870-71; 872; 874; 876-878; 880). Moreover, Letters of Counsel issued to NNU detectives found violations of the change and chain of custody issues, state these violations brought discredit to WVC PD and loss of public confidence, and

¹From this point, WVC's arguments attempt to address in general order those presented in Coyle's brief.

state the violations were done at supervisors' direction. *See* City's Init. Brf. pp.27-28. In short, the Letters identify a higher violation, *i.e.*, supervisory failure.

Further, Coyle's statement that IA13-008 found "only minor problems in the unit" is misleading. *Id.* p.xiv. IA13-008 found widespread policy violations as well as identifying a failure to supervise by Coyle, including that NNU detectives distrusted him and did not respect him. City's Init. Brf., pp.14-17. These opinions by detectives and the widespread violations led to an additional investigation, IA13-0016, which was the supervisory investigation. What is particularly significant on appeal is that Chief Marx testified he relied on all these reports and investigative transcripts in making his decision. *Id.* p.23 (citing R.1527-1631; 1530-31, 1534).

E. COYLE IMPROPERLY MINIMIZES CHAIN OF CUSTODY VIOLATIONS.

Coyle attempts to diminish the impact/significance of the chain of custody violations by terming these as "failure to fill out supplemental reports." *See, e.g.*, Coyle's Brf. p.vii. However, the failure here is widespread breaks in chain of custody, not just paperwork problems. Coyle's rephrasing this as "failure to fill out" supplemental forms simply underscores his failure to take responsibility. In fact, Chief Marx testified what this violation amounted to was Coyle's failure to ensure his detectives were handling and booking evidence correctly. R.1553-54.

The law is clear: "Before a physical object or substance connected with the commission of a crime is admissible in evidence there must be a showing the proposed exhibit is in substantially the same condition as at the time of the crime." *State v. Torres*,

2003 UT App 114, ¶8, 69 P.3d 314 (internal quotation marks omitted (citations omitted)). If the exhibit has been changed or altered, the trial court can refuse to admit it. *Id.* Here, there is a gap in custody between the detective first receiving evidence, and the evidence officer who stores it. Although weak links go to the weight of the evidence once admitted (*id.* ¶9), this gap amounts to no link to the point that defendants could challenge even admissibility of such evidence. In short, “failure to fill out supplemental reports” glosses over evidence handling failures. *See, e.g.,* City’s Init. Brf. p.33 (Powell’s testimony on chain of custody problems).

F. COYLE LOSES CREDIBILITY BY ARGUING LACK OF TRAINING.

Coyle attempts to excuse his failures by contending he lacked training/schooling. Coyle’s Brf. p.x. This only confirms it was appropriate to remove him from a supervisory position. Coyle became a sergeant in 2006, and then was lieutenant in Patrol for eighteen months before becoming NNU lieutenant. *Id.* For him to contend he did not know a lieutenant’s job description is disingenuous since an officer who is supervisor material should be able to determine what information is needed, including a job description, and locate it himself. Coyle apparently could not.

G. THE COMMISSION DID NOT ADDRESS ALL POLICY VIOLATIONS.

The Court should reject Coyle’s argument that the Commission actually did make findings of fact as to his violation of WVCPD Policy 300.5 (Supervisor Responsibility). Coyle’s Brf. p.1. The Commission did not do this. Coyle contends this was “discussed” in the Commission’s Decision at R.1844-45 (¶12) and R.1848 (Commission’s Analysis, Section II). *Id.* However, the Commission’s Decision at R.1844-45 states supervisors

“did not clarify the change in policy” and “did not verify compliance” by NNU. R.1844-45, ¶¶i-j. These statements suggest either there was no Policy 300.5 violation, or it is ambiguous. Furthermore, this section of the Commission’s Decision involves only BlueTeam software, whereas Chief Marx also found Supervisor Responsibility failure/violation in the chain of custody issue. *See* City’s Init. Brf. p.8 (citing R.4-5). In light of this and contrary to Coyle’s contention, the *Harmon* case does apply here since the Commission failed to make findings of fact on Policy 300.5. *See Ogden City Corp. v. Harmon*, 2005 UT App 274, ¶14, 116 P.3d 973.

As for WVC PD Policy 340.3.5 (Performance), Coyle is incorrect when he contends the heading of ¶13 of the Commission’s Decision is a conclusion as to Performance. This heading simply restates Chief Marx’s allegation against Coyle, and is not a conclusion by the Commission. *See* Coyle’s Brf. p.3. Indeed, statements under this heading include the Commission’s justifications that Coyle received no training, and also attempt to lay fault on Coyle’s supervisors. *See* R.1845. Significantly, since the Commission’s Decision’s Conclusion does not list Performance as being violated, the Commission must not have deemed it a violation although it clearly was.

With regard to the caption of Section II of the Commission’s Decision, it says one thing and then concludes something different. Although the heading states “Sufficient Evidence Exists to Support the Allegation that Lt. Coyle Violated [WVC PD] Policy 804.3 Property Handling,” the Commission’s analysis then goes on to state Coyle *did not* violate Policy 804.3 as to seized vehicles. Moreover, the analysis is ambiguous about

whether the Commission felt Coyle violated Policy 804.3 as to chain of custody. R.1847-48.

As for Supervisory violation, Supervisor Responsibility is discussed in the Commission's Decision only in connection with BlueTeam. *See* R.1847-49. The Commission also should have discussed it in connection with chain of custody.

Finally, the reality is that whether there is a violation of Performance is not stated in the Commission's Decision. R.1853-54. Even though Coyle contends it is listed inasmuch as "failure of performance" is stated in the caption of the Commission's Decision at ¶13, as WVC points out above, that caption simply restates Chief Marx's allegation and is not the Commission's conclusion. *See* R.1845. Indeed, Coyle even admits the Commission did not separately analyze Performance. Coyle's Brf. p.4.

In sum, the Commission's Decision fails to make specific findings on several violations that were part of Chief Marx's decision, such as Supervisory failure as to chain of custody, and Performance.

H. THE COMMISSION ERRED IN EVIDENTIARY RULINGS.

1. Protected Exhibits Were Proffered, and The Record Cannot Be Disregarded.

Coyle argues: (1) WVC's not objecting to a protective order over certain exhibits means the Commission could prohibit Chief Marx from testifying about matters *in* those exhibits and WVC was required to direct the Commission to specific parts of those exhibits (by proffer) if it wanted the Commission to consider them; and (2) testimony about Coyle's playing video games at work/working fewer hours than claimed is

irrelevant because that alleged misconduct was not contained in the Notice of Disciplinary Decision. Coyle's Brf. p.5. These arguments should be rejected.

The Commission must consider the entire record whether a proffer is made or not, and the protected exhibits were admitted as evidence and were part of the record. Coyle even agrees the Commission denied his motion to exclude this evidence. Coyle Brf. p.6. Thus, the exhibits were before the Commission and part of the record whether or not proffered. Moreover, WVC did proffer all of these exhibits by stating in written proffer:

At the close of evidence, the Commission asked both parties to proffer any further evidence from the exhibits under "protective order" in writing . . .
Pursuant to the CSC's ruling that Exhibits 11-18 and 21 were submitted as evidence, they should be reviewed, in camera, in their entirety.

R.91 (emphasis added). As for specifically proffering, WVC did make specific proffer as to Coyle's admissions as to the failure to follow policy regarding the BlueTeam software, the property and evidence booking, and retaining items from forfeited vehicles. R.1556-57.

In addition, NNU detectives' statements about Coyle not working 40 hours per week/playing video games *is* relevant. Policy 340.3.5 (Performance) states:

Any . . . conduct which any employee knows or reasonably should know is unbecoming an employee of the Department or which is contrary to good order, efficiency or morale or which tends to reflect unfavorably upon the Department or its members.

R.253 (emphasis added). Coyle's conduct impacted morale, and NNU Det. Salmon even stated in IA-13008 that Coyle had "no business being a lieutenant or a sergeant and very frankly ah [sic] I don't think he should be a police officer." R.836. Other NNU detectives told the IA-13008 investigator Coyle kept skiis in his police vehicle, was

untruthful about hours worked, and lied about his whereabouts. R.608-09, 836-38, 181-82, 1276. In this context, in the disciplinary decision Chief Marx states Coyle failed as a “mentor, guide and trainer.” R.7. Chief Marx also testified each and every NNU detective was frustrated and demoralized. R.1563. He also testified he found this because “the NNU had become a dysfunctional unit with a complete breakdown in good order and functionality.” R.123. These findings were illustrated/substantiated by NNU detectives’ negative opinion of Coyle as a supervisor, and although the Commission did not allow Chief Marx to testify about detectives’ statements, he did testify he relied on everything in the exhibits (R.1529-31), and all exhibits were proffered.

2. The Commission Made Repeated Improper Hearsay Rulings.

Coyle gives several reasons why he believes the Commission did not err in hearsay rulings. These are without merit.

First, Coyle’s contention that WVC should have made a presumably verbal proffer of testimony illustrates the difficulty WVC faced in presenting its case. WVC could not refer to anything in the protected but *admitted* exhibits, so it was impossible to verbally proffer testimony. Further, proffer typically goes to admissibility but the exhibits already had been admitted.

Second, for the same reason, the Court should reject Coyle’s contention that three instances cited by WVC should be disregarded because WVC “did not create a record by proffering the testimony it believes would be elicited.” Coyle’s Brf. p.8. In those three instances the information that would be elicited was reflected in the question asked by WVC, then was objected to as hearsay by Coyle, and finally was ruled inadmissible

hearsay by the Commission. *Id.* For example, the question to D.C. Powell (“example of . . . without giving person’s name . . . one thing that stands out in your mind”), was preceded by a general explanation of the community’s phone calls and comments to D.C. Powell expressing their concerns, frustrations and anger with WVCPD. R.1293-94. However, when D.C. Powell was asked for a specific example, Coyle objected on hearsay grounds and said “if they’re going to rely on this . . . they need to have [citizens] in here.” R.1295. Commissioner Attridge then spoke up and said the three Commissioners all lived in WVC and knew what was being said so the testimony isn’t “out of time.” *Id.* Coyle’s lawyer then stated the Commissioners should recuse “if . . . you already have an idea.” *Id.* After subsequent lengthy discussion by Coyle of how the Commissioners were prejudiced, followed by a recess, the Commissioners sustained the hearsay objection. R.1295-302.

In the second incident Chief Russo was not allowed to testify about what his officers had told him about how they felt about the “scandal.” R.1420-21. Coyle’s lawyer objected and, knowing NNU officers would assert Fifth Amendment rights, blithely said:

Why doesn’t he bring in some of the officers from the narcotics unit and ask them. I say that facetiously or half facetiously.

R.1420. After this WVC reminded the Commission they could admit hearsay which would go to weight, and that this evidence to be elicited did not go to the truth of the matter asserted but “it’s just one of the things that [Chief Marx] would consider . . . when he made his decision.” R.1421-22. Despite this, the Commission sustained the objection,

and then later stated in the ruling they would not consider how WVCPD officers felt.

R.1422-23, R.1850.

In the third situation which involved the Commission's ruling that it was prohibited hearsay, Chief Marx was not allowed to testify he had concluded officers lost confidence in Coyle. Coyle argues no foundation was laid, and contends the foundation that should have been laid is "who [Chief Marx] talked with, when he talked to them, what he said, what they said." R.1564-65. However, Coyle knew the Commission would not allow NNU officers to be named, or their testimony in the exhibits to be presented in hearing. The result was a Catch-22 for WVC, *i.e.*, it had been ordered not to discuss this foundation, but then was punished when it could not do so.

I. THE COMMISSION FAILED TO ADDRESS ALL REASONS FOR DEMOTION.

It is undisputed that the Commission failed to consider Coyle's failure to take personal responsibility. Coyle excuses this by contending Chief Marx did not cite this as a reason for discipline. Coyle's Brf. p.10. This is incorrect. "Performance" clearly is cited as a reason for discipline and part of Chief Marx's decision is Coyle failed as a "mentor, guide and trainer." R.7. Coyle waives aside Coyle's failure to accept responsibility by stating Chief Marx explained why he wrote the "failure to take responsibility" paragraph but "importantly [he] did not testify that it was a basis for his decision or constituted a policy violation on the part of Lt. Coyle." Coyle's Brf. p.11. This is disingenuous. Chief Marx's testimony on the relevant pages shows the demotion decision was being discussed, including "leadership is an honor and privilege. It comes

with great responsibility” and he felt Coyle did not meet that responsibility. R.1557-58. There also is no merit to Coyle’s attempt to equate this to *Salt Lake City Corp. v. Salt Lake City Civil Serv. Comm’n*, 2006 UT App 47, where the police chief did not specifically mention processing/ distribution of peyote. Failure of responsibility, failure of leadership, and failure to train and mentor are all specifically stated in Chief Marx’s Decision. For the Commission to ignore Chief Marx’s concluding paragraph dealing with failure to take responsibility was to ignore his reasoning and discretion on why demotion to a non-supervisory position was appropriate.

Finally, Coyle argues he actually did take responsibility. Coyle’s Brf. p.11. However, Chief Marx obviously would not agree and there is evidence of why he would not agree. For example, in the predisciplinary meeting with Chief Marx, Coyle attempted to excuse his actions by saying no one ever told him that change in seized vehicles should be booked into evidence, and also excused himself by saying Det. Frausto was the asset seizure specialist. R.1721. It also is significant that Chief Marx testified he did not think in the predisciplinary hearing that Coyle “grasp[ed] the concern” about the dismissal of felony cases. R.1542; *see also* City’s Init. Brf. p.20 (excuses given by Coyle in predisciplinary hearing).

Finally, what Coyle calls his allegedly “straightforward and responsible” testimony at the *Commission* hearing is irrelevant. *See* Coyle’s Brf. p.12. The factor for the Commission to assess was how Chief Marx viewed Coyle’s demeanor and acceptance of responsibility, *etc.*, when Chief Marx was making *his* decision. If the Commission was swayed by and/or relied on after-the-fact change of demeanor or its own perceived

acceptance of responsibility by Coyle *during the Commission hearing*, it exceeded its authority and abused its discretion.

J. IT WAS ERROR TO DISREGARD DISMISSAL OF FELONY CASES.

Coyle contends it was proper for the Commission to refuse to consider D.A. Sim Gill's dismissal of dozens of NNU cases, giving as his reason there was no evidence dismissals were due to NNU's failure to properly handle evidence. Coyle's Brf. pp.12-13. After stating this, however, Coyle then goes on essentially to admit that everyone, including the Commission, knew the cases were dismissed due to flaws caused by NNU. Coyle's Brf. p.13.

More significantly, there was unchallenged testimony that dismissals were due to chain of custody, but the Commission disregarded this. For example: (1) DC Powell testified "[t]here were a large number of cases that were dismissed at the [D.A.'s] Office. And the [WVC] Prosecutor's Office cited there were concerns over chain of custody as it pertained to evidentiary aspects on numerous investigations" (R.1283-84); (2) Chief Marx testified numerous felony cases were dismissed because the DA "feels that there would be challenges in court on the *custody of evidence*" (R.1542) (emphasis added). These instances alone are sufficient to show the Commission erred.

The reality is that it was Chief Marx's understanding/belief that NNU cases were dismissed due to chain of custody problems and, due to his discretion, this justifies his decision and provides any "link" needed. Indeed, the Commission is required to give deference to a Chief's disciplinary decision making.

Finally, Coyle attempts to explain away the critical fact of his own admission that D.A. Anna Rossi told him one of his cases had been one that was dismissed, by stating "that case involved a suspect who had assaulted [Coyle] with a knife, and had nothing to do with the handling of evidence." Coyle's Brf. p.14. This is blatantly incorrect. Although Coyle was cut with a knife during the incident, the following statements by Coyle in the predisciplinary meeting make clear dismissal of that case had to do with handling of drug evidence by NNU, *i.e.*, chain of custody, and also had to do with D.A. Sim Gill's opinion that NNU's credibility was tainted:

Marx: John, let me ask you this: was there ever any training ever given to you or your sergeant specifically about the supposed need for a sup [sic] report in that circumstance?

Coyle: No. No. I—I haven't received any training on it. I mean, probably the last evidence training I received was in FTO or out at the academy. . . . it's coincidental that . . . DA Anna Rossi called me this morning. I don't know if you recall the — the fight I had down in Chesterfield where I got stabbed in the hand, the guy I fought with. I got in a fight when we —as the narcotics unit, we made contact at Larry Miller's trailer. . . . *A guy tried to flush an ounce of dope.* I got in a fight with him, he swung a knife at me a couple of times, cut my hand. . . . Anyway, long story shorter, we went to a prelim. The guy was bound over. He was sent to California because he was wanted on several NCIC warrants out of California for weapons violations and drug violations. We went through the prelim. Anna called me up this morning, coincidentally. . . . [S]he said, "Hey, I just wanted to let you know, I feel horrible. *You know that that case was dismissed---one of the cases that was dismissed, correct?*" And I said, "No, I did not know that, but thank you for telling me." And she said, "I wanted to let you know that you did excellent work on it. I had no problems with anything in that report. Your report was excellent. Your testimony was excellent. It was a great case." She even said . . . ["I was pissed off when I found out that it was dismissed myself.[?"] And you know, that's---*we handled evidence in that case*, and *she* had no issues with any evidence or anything that we did in that case.

R.428-29. Coyle's statement about that case being "one of the cases that was dismissed" by D.A. Sim Gill is significant, particularly since those involved included Coyle, Salmon and other NNU detectives, and the case involved drug evidence. Assistant D.A. Rossi did not dismiss the case—D.A. Sim Gill did—and it was one of the dozens he dismissed. This shows there were dismissals because of a perceived taint by NNU's involvement, which goes directly to the chain of custody and credibility issues. Accordingly, based on this admission about a NNU case involving "dope" being one of "the cases" dismissed, the Commission erred in finding no link. This is even more significant combined with Coyle's hearing testimony that he was aware that dismissed felony cases involved NNU members, and his lawyer's statement in closing argument that the DA dismissed the cases based on credibility of NNU officers. R.1759-60, 1793.

K. COYLE MISCONSTRUES THE CHANGE ISSUE.

The Decision explicitly states "the Commission determines that [Coyle] did not violate WVC PD Policy 804.3 Property Handling as it relates to the cleaning out of seized vehicles." R.1849. Coyle now contends WVC misreads the Decision, and the Commission did not reach that decision. Coyle's Brf. p.15. However, the Decision states what it states.

Alternatively, Coyle contends the Commission reached the same decision as WVC with regard to the change issue, *i.e.*, Coyle was exonerated and that issue cannot be charged against him. Coyle's Brf. pp.16-17. Again, Coyle misreads the Decision. Even IA13-008, which dealt with Coyle's personal responsibility, found he personally violated the Policy. *See* R.215-223 at 219. In this context, Coyle also argues it makes no sense to

find there was a failure of supervision regarding the change issue when “the PSRB, the Department and the City concluded [in IA13-008] there was no wrongdoing by [Coyle] or anyone else” regarding handling loose change. Coyle’s Brf. p.18. Again, Coyle misunderstands because NNU detectives were disciplined in IA13-008 for personal/individual responsibility in the change issue. They received Letters of Counsel in part for the change issue, and that discipline might have been harsher but for recognition their actions were done at supervisors’ direction. *See* Lund (R.26-64); Smith (R.1118-20); Frausto (R.264-66); McCarthy (R.267-68); Franco (R.269-73).

As for Coyle’s own personal actions, in a clarification to Chief Marx, Lt. Merritt confirmed Coyle personally was one of those taking money from seized vehicles. R.1019-20. Chief Marx sustained the allegation of Coyle’s collecting money and not booking it into evidence. R.4. Chief Marx further stated the sustained conduct (including change issue) “falls below the standard of excellence we expect our supervisors to display. By participating in the above conduct you have displayed a casual disregard for WVC PD policy and the responsibility of a supervisor which will not be tolerated.” R.7.

L. IT WAS AN ABUSE OF DISCRETION TO DEEM VIOLATIONS TECHNICAL.

WVC contends the Commission abused its discretion when it deemed violations as “technical,” thereby minimizing acts it acknowledges occurred. Coyle disagrees, but his reasoning is without merit.

First, Coyle contends WVC's argument is inconsistent because "on one hand it contends the Commission first decided the violations were technical and this distorted how it interpreted the facts pertaining to the misconduct," and on the other hand "[WVC] contends the Commission misinterpreted the facts to conclude the violations were 'technical.'" Coyle's Brf. p.19. This is incorrect. WVC contends the Commission found the facts supported the charges, but the Commission then concluded the facts/charges were "no big deal" for reasons arrived at wholly by the Commission.

For example, WVC contends the Commission went outside its authority and rationalized away obvious chain of custody violation(s) by stating there is no evidence dismissal of cases by the D.A. (and WVC prosecutor) was due to chain of custody concerns, and there was no evidence NNU was keeping trophies. The Commission's trophy excuse is puzzling since "trophy keeping" was not alleged by Chief Marx. As for chain of custody, the Commission minimized this by deciding Coyle was only negligent. However, when every NNU detective receives a Letter of Counsel for chain of custody violations, the lieutenant in charge cannot have been only negligent and therefore blameless. The same is true for minimizing as "technical" the admitted BlueTeam Software violations, where Coyle claimed this was not his job. Even the Commission found Coyle allowed NNU to improperly document uses of force contrary to policy. *See* R.1848.

Second, even assuming the Commission could minimize admitted violations, the reasons given by the Commission are not supported by the facts. A lieutenant cannot be only negligent when there is wholesale violation of chain of custody by detectives under

his command and he thinks this is alright. Coyle's attempt to minimize this is reminiscent of *Harmon*, where the Ogden Civil Service Commission chose not even to consider the "zucchini" incident because it found the victim's discussion with the supervisor who made this remark was consensual, the victim laughed, and it was an isolated incident. *Harmon*, 2005 UT App 274, ¶5. However, in *Harmon*, the Commission at least was candid enough to find the facts did not support the charges based on the victim's alleged consent. By contrast, the Commission here agrees there was violation but then minimizes it before reaching the proportionality analysis. Furthermore, the Commission here used faulty evidentiary rulings to minimize the facts, e.g., stating there was no evidence the dismissed cases were due to chain of custody and refusing to find public displeasure based on the fact no citizen actually appeared to testify about public displeasure with WVC PD.

Third, Coyle argues WVC has a "stiff burden to successfully challenge" factual findings and WVC had to marshal the evidence. Coyle's Brf. p.21. WVC did marshal the evidence, and the Commission confirmed Chief Marx's factual conclusions by agreeing all incidents occurred. Coyle also contends he was only negligent in the chain of custody issue and the standard is what a reasonable and prudent person would have done under the circumstances. Coyle's Brf. pp.22-23. However, in the predisciplinary meeting with Chief Marx, Coyle stated he saw no problem with the property booking method and a DA/prosecutor/superior should have said something to him about it. R.422-28. If Coyle as a police professional and supervisor saw no problem with the booking method, he was not simply negligent. It also is significant that much of Coyle's

argument goes to how it was not *his* fault this occurred, and instead was Sgt. Johnson's fault. Coyle's Brf. pp.21-23. This further illustrates why Chief Marx found Coyle did not take responsibility.

Fourth, Coyle contends it was West Valley City's burden to show the misconduct occurred, and also "demotion was the proper discipline." Coyle's Brf. p.21 n.20. This is incorrect. It is Coyle's burden to show discipline is "disproportionate to the offense(s)." *Huemiller v. Ogden Civil Serv. Comm'n*, 2004 UT App 375, ¶6, 101 P.3d 394. To do this, Coyle can attempt to show demotion is not within the range of sanctions allowed, or is not proportional, or there is a "meaningful disparity of treatment between [him]self and other similarly situated employees.'" *Id.* (quoting *Kelly v. Salt Lake City Civil Serv. Comm'n*, 2000 UT App 235, ¶30, 8 P.3d 1048); *Nelson v. Orem City*, 2012 UT App 147, ¶20 & ¶27 n.6, 278 P.3d 1089. The Commission erred here since it placed a burden on WVC, stating "the City provided no evidence that other supervisors in similar situations were similarly disciplined." R.1849-53. This alone is sufficient to reverse the Commission's decision.

Fifth, Coyle argues that in 2012 and 2013 "WVPD was undoubtedly under considerable scrutiny" so nothing should be "blamed" on Coyle. Coyle's Brf. p.24. This appears to be what the Commission thought, and it abused its discretion when it referred to "technical" violations not being significant in light of the "heightened scrutiny that WVCPCD and the NNU were under due to the unsubstantiated allegations of more serious violations." R.1850. However, the Commission has no authority to refer to the environment in which Coyle's violations were uncovered. Indeed, this amounts to the

Commission's including all of Det. Cowley's original allegations, many unfounded, and then stating everything—including things Chief Marx never considered—showed discipline was excessive. Moreover, it ignores Chief Marx's testimony that "if [Coyle] had been a very capable and very good supervisor we would not be here today," and would not have had the problems that resulted from Coyle's failures, or a breakdown and dysfunction in NNU. R.1561.

Sixth, Coyle contends it is "pure speculation" that failure to document uses of force on BlueTeam might cause problems for WVCPD in the future. Coyle's Brf. p.25. However, this obviously is short-sighted.

Finally, in discussing why BlueTeam is a "technical" violation, Coyle only reiterates it was Sgt. Johnson's fault. Coyle's Brf. pp.25-26. Again, the reason Chief Marx believed Coyle failed to accept responsibility.

M. THE COMMISSION'S DECISION ON DISCIPLINE SHOULD BE REVERSED.

Coyle argues the Commission did not err when it determined the disciplinary decision of Chief Marx was neither proportional nor consistent. Coyle's Brf. pp.26-32. This argument should be rejected, and the Commission abused its discretion as well as exceeded its authority.

1. Proportionality

Regarding proportionality, Coyle is incorrect when he argues the *Harmon* factors were not met, whether by violations found by Chief Marx or those found by the Commission. See *Harmon*, 2005 UT App 274, ¶18.

First, all violations found by Chief Marx as well as by the Commission related to Coyle's official duties and impeded his ability to perform those duties. His failure to supervise alone meets this test.

Second, Coyle's failure to require proper chain of custody alone is *of a type* that adversely affects public confidence in NNU. Evidence is critical in police work involving narcotics, yet Coyle's attitude about chain of custody was cavalier.

Third, Coyle's failure to require proper chain of custody and deal with the change issue, alone, undermined the morale and effectiveness of NNU. This is true if only because every detective was disciplined because of *Coyle's* supervisory and leadership failure. The record also shows NNU detectives had little regard for Coyle's leadership, did not think he worked his required hours, thought he played video games at work, and even thought Coyle should not be in police work. See R.181-82, 529-50, 604, 607-09, 640, 644-46, 709, 746-47, 749-52, 817, 836-38, 841-42, 10-43-46, 1273-76.

Fourth, Coyle was more than negligent. Coyle knew about violations yet did nothing, including that his Supervisory and Performance violations clearly were knowing. For example, Det. Frausto raised the change issue but Coyle did nothing, and Coyle admits he could have corrected the chain of custody problem yet he did not.

Finally, Coyle's suggestion the Commission found there was no "dishonor to WVCPD" or "undermin[ing] [of] the public trust" because the violations were minor in light of the "unsubstantiated allegations of more serious violations," confirms the Commission abused its discretion and exceeded its authority. This suggests the Commission looked at Det. Cowley's allegations and since not *all* of those were verified

or found valid in Lt. Merritt's investigation, this meant Chief Marx should have given a lesser discipline. However, the Commission had no authority to go back and look at Det. Cowley's allegations. It had authority only to assess the violations that *were* found valid and used by Chief Marx as the basis for discipline. The Commission clearly was outside its authority if it assessed discipline in this way.

2. Consistency

Although Coyle mentions other NNU detectives in his consistency argument, he does not appear to seriously believe they are similarly situated to Coyle despite the fact the Commission compared them to Coyle in its Decision. It is appropriate to give the Commission's comparison here short shrift because NNU detectives are not similarly situated to Coyle, except insofar as they were disciplined because of Coyle's supervisory failures. Coyle does suggest that the fact that detectives, Sgt. Johnson, and Coyle were investigated in IA13-008 means they are similarly situated. However, the investigation that was the basis for Coyle's discipline is IA13-016, and NNU detectives had no part in that. The Commission's using NNU detectives for comparison is an abuse of discretion.

Coyle focuses his consistency argument primarily on comparing Coyle's discipline with that of Sgt. Johnson. *See* Coyle's Brf. pp.30-32. He suggests Sgt. Johnson is similarly situated because Sgt. Johnson: (1) was "primarily responsible for seeing that evidence was properly booked into the evidence room [and documented]," and (2) "was supposed to make the entries in BlueTeam Software and then bring the entries to Coyle's attention." Coyle's Brf. pp.31-32. These do not make Coyle and Sgt. Johnson similarly situated. Coyle was a lieutenant and in charge of NNU. He also had

been a lieutenant in Patrol for eighteen months, and before that was a sergeant starting in 2006. Sgt. Johnson had been a sergeant only since 2011. Chief Russo testified a lieutenant is “probably the most powerful individual in [a] police department.” R.1416. As lieutenant, Coyle was Sgt. Johnson’s supervisor and was responsible for regularly auditing *both* Sgt. Johnson and NNU detectives. R.1845-46. Further, Chief Marx testified: (1) he saw a difference in the acceptance of responsibility and the understanding Sgt. Johnson had of “the ramifications for the events;” and (2) the higher the rank in a police department, the greater the responsibility and accountability. R.1572-74. The Commission did not consider this.

II. CONCLUSION

Based on the arguments in this brief and its initial brief, WVC respectfully asks this Court to reverse the decision of the WVC Civil Service Commission, and to reinstate the disciplinary decision of Chief Marx.

DATED this 7th day of September, 2014.

SNOW CHRISTENSEN & MARTINEAU

By


Camille N. Johnson

Judith D. Wolferts

Maralyn M. English

Attorneys for Petitioner West Valley City

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION,
TYPEFACE REQUIREMENTS, AND
TYPE STYLE REQUIREMENTS**

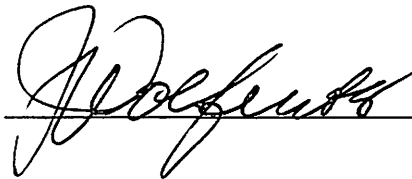
1. This brief complies with the type-volume limitation of Utah R. App. P.24(f)(1) because:

- ☒ this brief contains 6,967 words, excluding the parts of the brief exempted by Utah R. App. P.24(f)(1)(B), or
- ☐ this brief uses a monospaced typeface and contains [state the number of] lines of text, excluding the parts of the brief exempted by Utah R. App. P.24(f)(1)(B).

2. This brief complies with the typeface requirements of Utah R. App. P.27(b) because:

- ☒ this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman 13 pt. font, or
- ☐ this brief has been prepared in a monospaced typeface using [state name and version of word processing program] with [state name of characters per inch and name of type style].

DATED this 7th day of January, 2015.




CERTIFICATE OF SERVICE

I hereby certify that on the 14 day of January, 2015, I caused two (2) true and correct copies of the REPLY BRIEF OF WEST VALLEY CITY to be mailed by first class United States mail, postage prepaid, to the following:

Erik Strindberg
STRINDBERG & SCHOLNICK, LLC
675 East 2100 South, Suite 350
Salt Lake City, UT 84106
Telephone: (801) 359-4169
Attorneys for Respondent Coyle

WEST VALLEY CITY CIVIL SERVICE COMMISSION
3600 Constitution Blvd.
West Valley City, UT 84119-3720



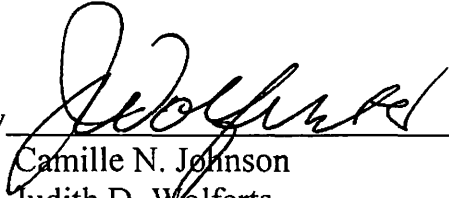
been a lieutenant in Patrol for eighteen months, and before that was a sergeant starting in 2006. Sgt. Johnson had been a sergeant only since 2011. Chief Russo testified a lieutenant is “probably the most powerful individual in [a] police department.” R.1416. As lieutenant, Coyle was Sgt. Johnson’s supervisor and was responsible for regularly auditing *both* Sgt. Johnson and NNU detectives. R.1845-46. Further, Chief Marx testified: (1) he saw a difference in the acceptance of responsibility and the understanding Sgt. Johnson had of “the ramifications for the events;” and (2) the higher the rank in a police department, the greater the responsibility and accountability. R.1572-74. The Commission did not consider this.

II. CONCLUSION

Based on the arguments in this brief and its initial brief, WVC respectfully asks this Court to reverse the decision of the WVC Civil Service Commission, and to reinstate the disciplinary decision of Chief Marx.

DATED this 7th day of January, 2015.

SNOW CHRISTENSEN & MARTINEAU

By 
Camille N. Johnson
Judith D. Wolferts
Maralyn M. English
Attorneys for Petitioner West Valley City